

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

**FILE:**

B-220871

**DATE:** March 4, 1986

**MATTER OF:**

Towmotor Corporation

**DIGEST:**

Where, before award, information comes to the attention of the contracting officer which is inconsistent with the small business certification of a bidder that would be low if given the benefit of the 12 percent Buy American Act differential applicable to small businesses, the contracting officer should determine if the bidder's self-certification is correct.

Towmotor Corporation, a subsidiary of Caterpillar Tractor Company, protests the award of a contract for a forklift truck to Medley Material Handling, Inc. under invitation for bids (IFB) No. 15-PI-3708. UNICOR/Federal Prison Industries, Inc., Federal Correctional Institution, El Reno, Oklahoma, issued the solicitation on August 12, 1985. Towmotor protests that the forklift offered by Medley does not qualify as a domestic end product as defined by the Buy American Act, 41 U.S.C. §§ 10a-10d (1982). Therefore, according to Towmotor, UNICOR improperly added a differential to its own low bid for a forklift manufactured in Korea, rather than evaluating the bids on an equal basis. Alternatively, the protester contends that, even if Medley's forklift qualifies as a domestic end product, Towmotor's bid remains low if the Buy American Act differential is properly applied.

We sustain the protest.

UNICOR sought bids on an f.o.b. destination basis for a forklift having a 6,000 pound capacity. The specifications required that it be propane propelled, with automatic or hydrostatic transmission, power steering, and various other features; however, bidders were not required to identify the make or model of the forklift offered.

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Of 10 bids submitted, Towmotor's was low at \$13,800, and Medley's was second-low at \$14,659. In evaluating Towmotor's bid, UNICOR added 12 percent (\$1,656) as a Buy American Act differential and 1.1 percent (\$151.80) for import duty, resulting in an evaluated price of \$15,607.80 and making Medley the low bidder. UNICOR awarded a contract to Medley on September 18, 1985, an action that Towmotor protested to the agency and then to our Office. Performance has been stayed pending our decision. .

UNICOR contends that we should dismiss Towmotor's protest as untimely because it was filed 18 days after the date of a letter denying Towmotor's agency-level protest. Towmotor, however, states that it received the agency's letter of October 4, 1985, on October 8. Its subsequent protest, filed with our Office on October 22, is therefore timely under our Bid Protest Regulations, which require that where a protest has been filed initially with the contracting agency, a subsequent protest to our Office must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action. See 4 C.F.R. § 21.2(a)(3) (1985).

The Buy American Act establishes a preference for products mined, produced, or manufactured in the United States to offset partially the competitive advantages that may be enjoyed by foreign competitors. See Dawson Construction Co., Inc., B-214070, Feb. 8, 1984, 84-1 CPD ¶ 160. This preference is implemented by the addition of a differential to the price bid for a foreign product. See Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 CPD ¶ 668. Applicable regulations provide that 6 percent is to be added to the low acceptable foreign offer, inclusive of duty, if the low domestic offeror is a large business. However, the differential increases to 12 percent if the low domestic offeror is a small business concern. Federal Acquisition Regulation (FAR), 48 C.F.R. § 25.105(a) (1984). A nonmanufacturer is considered small, and therefore eligible for application of the 12 percent differential, only if it offers to furnish the domestic product of a small business manufacturer. FAR, 48 C.F.R. § 19.102-3(b); see also ASC Associates, B-199706, Feb. 5, 1981, 81-1 CPD ¶ 67.

In section K of its bid, Medley certified, in accord with the standard clause set forth in the FAR, 48 C.F.R. § 52.225, that it would provide a domestic end product. The clause requires bidders to list any non-domestic end products to be furnished; Medley listed none. Medley also represented in its bid (for purposes of the Walsh-Healey Public Contracts Act) that it was not a manufacturer. In

accord with the standard clause set forth in the FAR, 48 C.F.R. § 52.219-1, Medley certified that it was a small business and would furnish a product manufactured or produced by a small business concern in the United States.

#### Domestic End Product

Towmotor first argues that the forklift offered by Medley is not a domestic end product as defined by the Buy American Act, and therefore is not entitled to the evaluation preference that UNICOR implemented by adding a differential to Towmotor's bid. Towmotor states that Medley is a distributor for and will be supplying a forklift manufactured by Yale Materials Handling Corporation. Towmotor has submitted documents purporting to show that in late 1983 the Eaton Corporation, of which Yale was a subsidiary, and a Japanese firm entered into a joint venture and agreed to produce all Yale forklifts up to 7.5 tons in Japan.

Following Towmotor's agency-level protest, UNICOR sought verification of this certification and obtained from Medley a statement that only the chassis of the Yale forklift, which represents 41.6 percent of the product's total value, is manufactured in Japan. The remainder of the forklift components, Medley stated, are manufactured and assembled in the United States.

Towmotor contests this statement and asserts that the chassis of its own forklift represents approximately 80 percent of the total cost of the product. Further, Towmotor argues, the mere domestic installation of the carriage, mast, and forks does not meet the criteria for manufacture in the United States.

Where, as here, a bidder does not exclude any end products from its Buy American Act certification in its bid and does not otherwise indicate that it is not offering domestic end products, the government's acceptance of the bid results in a contractual obligation to furnish domestic end products. The bidder's compliance with that obligation is a matter of contract administration that has no effect on the validity of the award. See Autoclave Engineers, Inc., supra; Hybrid Technology Group, Inc., B-215168, Oct. 3, 1984, 84-2 CPD ¶ 385. Although an agency should not automatically rely on the certification where it has reason to question whether a domestic product will be furnished, see Designware, Inc., B-221423, Feb. 20, 1986, 86-1 CPD ¶ \_\_\_\_\_, there is no indication in the record before us that the contracting officer had any basis to question the certification here.

### Import Duty and Small Business Status

The protester alternatively contends that UNICOR should not have added any import duty to its bid, since it was already included in Towmotor's price. Towmotor also argues that Yale, the manufacturer of the forklift offered by Medley, is obviously a large business, and that therefore, even if Medley's forklift is domestic, UNICOR should have applied only a 6 percent (\$828) differential to Towmotor's bid. If evaluated in this manner, Towmotor's bid would have been \$14,628, compared with Medley's \$14,659.

We agree with Towmotor that UNICOR improperly added 1.1 percent to its bid to account for import duty. By requesting bids on an f.o.b. destination basis and by incorporating the standard FAR clause covering federal, state, and local taxes, 48 C.F.R. § 52.229-3, <sup>1/</sup> UNICOR required bidders to include this cost in their respective bids. Thus, there was no need for UNICOR to add import duty to Towmotor's bid.

With respect to Medley's certification regarding Yale's small business status, we have long recognized that contracting officials are obligated to question a firm's certification that it is a small business concern when information inconsistent with that certification comes to their attention before award. Foam-Flex Inc., 62 Comp. Gen. 300 (1983), 83-1 CPD ¶ 383; Keco Industries Inc., 56 Comp. Gen. 878 (1977), 77-2 CPD ¶ 98; see FAR, 48 C.F.R. § 19.301(b). While these cases have concerned certifications for purposes of establishing eligibility for small business set-aside contracts, we believe that the same standard should apply to certifications of small business status in connection with Buy American Act differentials. Cf. Designware, Inc., *supra*.

As noted above, the solicitation did not require bidders to identify the manufacturer of the offered forklift. However, the contracting officer clearly knew that Medley intended to supply a Yale forklift. On the abstract of bids, UNICOR listed the make and model of the equipment offered by each bidder and categorized each bid as either foreign or domestic. Apparently, UNICOR obtained this information before award for purposes of determining the bidders' responsibility. On the abstract, Medley is shown as offering a "Yale GLC060R (Domestic)." The manufacturer, Yale Materials Handling Corporation, is also listed as a bidder offering the same model forklift.

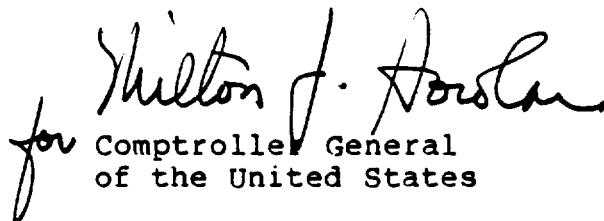
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<sup>1/</sup> The clause provides in pertinent part that the fixed contract price includes all applicable federal, state, and local taxes and duties.

Moody's Industrial Manual (1985) reports that in 1984 Eaton Corporation, formerly named Eaton Yale & Towne Inc. and then majority owner of Yale Materials Handling Corporation, had sales exceeding \$3.5 billion and had 42,709 employees on December 31, 1984. The small business size standard for manufacturers of industrial trucks is 750 employees. FAR, 48 C.F.R. § 19.102-2. While the procurement record does not establish that UNICOR had actual knowledge of the size of Yale, contracting officials have a wide latitude to exercise business judgment in performing their duties, see FAR, 48 C.F.R. § 1.602-2, and should be expected to have basic knowledge about the products they procure. In this case, the number of manufacturers of forklift trucks is relatively limited and, at least in 1984, Yale was a subsidiary of one of the largest domestic corporations.

We believe that, based upon the information obtained regarding the manufacturer of the forklift to be supplied by Medley, and the fact that Towmotor's bid would be low if Yale is not a small business concern, UNICOR had a duty to question Medley's certification. While we find that UNICOR failed to meet its obligation to determine if Medley's certification is correct, and sustain the protest for that reason, we do not recommend that the contract be terminated and reawarded to Towmotor without further inquiry. Eaton Corporation advises us that on March 11, 1985, it sold its 59 percent interest in Yale to the North American Coal Corporation of Cleveland, Ohio. North American in turn advises us that it now controls 84.6 percent of Yale's stock. Consequently, by letter of today to the Controller, Federal Prison Industries, Department of Justice, we are recommending that UNICOR determine whether Yale is currently a small business concern for the manufacture of forklifts. If it determines that Yale is not a small business, the Medley contract should be terminated and reawarded to Towmotor.

The protest is sustained.

  
for Comptroller General  
of the United States